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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

NANCY CORINNE DYER AND J. RAYMOND DYER,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION AND UNION ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1015

NANCY CORINNE DYER AND J. RAYMOND DYER,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION AND UNION ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B) is reported at 251 F. 2d 512. The Findings and Opinion and Order of the Securities and Exchange Commission (R. 26–44) [1] are set forth in Holding Company Act Release Nos. 13429 and 13450.

[1] The record in the court below was not printed, but parts thereof were multigraphed by petitioners pursuant to Rule 12 (f) of the court's rules. Nine copies have been filed with this Court.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1958 (Pet. App. B). Petitioners' timely petition for rehearing was denied on February 25, 1958. The petition for a writ of certiorari was filed on May 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Where petitioners, pursuant to Section 24 (a) of the Public Utility Holding Company Act of 1935, sought review of an order of the Securities and Exchange Commission authorizing a registered holding company to solicit proxies in connection with the annual meeting of stockholders, is the review proceeding rendered moot because during its pendency the meeting was held and the proxies were voted?

STATUTE INVOLVED

Relevant provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. § 79a, *et seq.*, and the applicable rules and regulations, are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

Petitioners, J. Raymond Dyer and his daughter, Nancy Corinne Dyer, record holders of 350 shares of the common stock of Union Electric Company ("Union"), a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a, *et seq.* ("the Act"), seek review of a judgment of the court below dismissing their petition for review of an order of the Securities and

Exchange Commission, dated March 21, 1957. The Commission's order granted Union authorization to solicit proxies in connection with its annual meeting of stockholders scheduled for April 20, 1957 (R. 42). The court below "dismissed as having become moot" the petition for review of the Commission's order (Pet. App. B, p. 33).

The Commission's jurisdiction over proxy solicitations with respect to a registered holding company is derived from Section 12 (e) of the Act. Section 12 (e) makes it unlawful to solicit proxies in respect of any securities of a registered holding company or any subsidiary company in contravention of "such rules and regulations or orders" as the Commission deems necessary or appropriate "in the public interest or for the protection of investors or consumers." Pursuant to Section 12 (e), the Commission issued a notice and order on February 27, 1957, prohibiting Union and all other persons from soliciting proxies for the 1957 annual meeting of Union's stockholders unless a declaration was first filed with the Commission and such a declaration was permitted to become effective. In compliance with this order, Union filed a declaration,[2] which included, *inter alia,* its proposed proxy statement, form of proxy or ballot, and estimated expenses in connection with its proposed solicitation of proxies. The solicitation, as authorized by the Commission, was for the purpose of electing direc-

[2] As noted in the Commission's Opinion, a "declaration itself is not material to be sent to a company's stockholders and is simply a document filed with this Commission giving the Company's own statement describing the subject matter of the filing" (R. 38).

tors and to obtain a vote of stockholders on several proposals of petitioners.

Petitioners had submitted to Union thirteen proposals in the form of resolutions or amendments to Union's by-laws for inclusion in Union's proxy statement and form of proxy. Eight of these proposals were included in the proxy statement and form of proxy which Union mailed to its stockholders. Petitioners' five other proposals were omitted on the ground that they did not meet the requirements of the proxy rules. The exclusion of these five proposals was one of the principal issues raised by petitioners in the court below.

For reasons discussed below, the Court of Appeals dismissed the petition for review on the ground of mootness. The court did not vacate the order of the Commission since, as the court said, the order "is not res judicata and will not tie the Commission's hands in the future" (Pet. App. B, p. 33).

DISCUSSION

1. Petitioners sought review of the Commission's order of March 21, 1957, pursuant to Section 24 (a) of the Act which gives the Court of Appeals "exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part." After the parties had briefed and argued the case on the merits, the court below, *sua sponte,* dismissed the petition for review on the ground that the issues were moot. The court apparently reasoned that under Section 24 (a) its jurisdiction was limited to a determination as to whether the solicitation had been properly authorized

by the Commission. Since the proxy solicitations had been completed, the proxies voted, and the stockholders' meeting held, the court concluded that no relief of any kind could be granted under Section 24 (a) even if, on the merits, the Commission's order was erroneous.

While we believe petitioners' contentions on the merits to be insubstantial, we do not agree that review on the merits under Section 24 (a) was foreclosed by reason of mootness. In holding the case moot, the decision below is inconsistent with *Okin* v. *S. E. C.*, 145 F. 2d 913 (C. A. 2), and *South Carolina Public Service Authority* v. *S. E. C.*, 170 F. 2d 948 (C. A. 4), which also involved review of Commission orders under Section 24 (a) of the Act. Although at the time of decision in those cases the transactions authorized by Commission orders had been consummated, both courts affirmed on the merits and expressly rejected the argument of mootness. In the *Okin* case (145 F. 2d at 914), the court said: "Even though the order has been carried out, we do not think he [petitioner] should be deprived of his right to a review * * * and hence we shall not dismiss his petition as moot." In the other case (170 F. 2d at 951–952), the court said:

> We have no doubt, however, as to our power to order the parties to set aside the sale and restore the situation that existed prior to the entry of the orders if we thought them invalid for any reason. The power of the court to review orders of the Commissions and grant effective relief may not be defeated by compliance with the orders. The Chicago Junction

Case, 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667. * * *[5]

Under the reviewing authority conferred upon it by Section 24 (a), the court below sits as a court of equity, "and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action", *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, 373. In a particular context, though we do not urge that such is the situation here, "the exigencies of the case" may, of course, involve supervening equities which have arisen during the pendency of the review and as a consequence of which judicial relief may be inappropriate. But such considerations are addressed to the discretion of the court when reviewing the case on the merits, not to the court's judicial power. The court below, however, dismissed the petition for review for lack of power to review the merits.

While Section 12 (e) of the Act declares unlawful the solicitation of proxies in contravention of the requirements prescribed by the Commission's rules or orders, judicial relief is not necessarily limited to a declaratory determination that the proposed solicita-

[5] Cf. *In re Electric Power & Light Corp.*, 176 F. 2d 687 (C. A. 2), in which the court affirmed on the merits an order of the District Court enforcing a Commission order approving a plan of dissolution for a registered holding company. Without discussing the question of mootness, the court noted that the consummation dates for the provisions of the plan preceded the date of the court's decision (176 F. 2d at 689, fn. 5). A stay pending review of the merits by the Court of Appeals had previously been denied by this Court. *In re Electric Power & Light Corp.*, 337 U. S. 903.

tion was or was not properly authorized. If it is determined that the proxy solicitation did not comply with the proxy requirements, the reviewing court may grant such relief as may be appropriate to secure compliance with the regulations. In the instant case, for example, petitioners claimed, *inter alia,* that Union's proxy material in connection with the 1957 annual meeting of stockholders was deficient in that it failed to include certain proposals of petitioners. If the Commission erred in permitting the exclusion of these proposals, the reviewing court may still remand the case to the Commission and direct compliance with the proxy regulations with respect to these proposals at a special or the next regular annual meeting of stockholders. A direction to resolicit to correct a violation of the proxy requirements would also be within the equitable jurisdiction of the court. See *S. E. C.* v. *Transamerica Corporation,* 163 F. 2d 511, 518 (C. A. 3), certiorari denied, 332 U. S. 847.

2. Although we disagree with the decision below, we do not suggest that the petition for a writ of certiorari be granted at this time. We believe that it would be appropriate to defer disposition of the petition until the court below decides another case brought by the same petitioners, *Dyer* v. *S. E. C.,* No. 15,989, which is now before it and in which the identical question of mootness is involved.

In the pending case below, petitioners seek review of an order of the Commission which had authorized Union to solicit proxies in connection with the annual meeting of stockholders scheduled for April 21, 1958—the annual meeting following the 1957 meeting in-

volved in the present case. Petitioners also sought a stay pending review, pursuant to Section 24 (b) of the Act, contending that, if a stay were not granted, the stockholders' meeting were held, and the proxies were voted, the case would be moot under the instant decision of the court below. The Commission opposed this request for a stay, and for the first time was in a position to express its disagreement with the court's decision in the present case on the question of mootness, which, as the Commission stated to the court, was inconsistent with the decisions of the Second and Fourth Circuits noted above.[4] By order dated April 18, 1958, the court denied petitioners' application for a stay but granted petitioners "leave to brief and argue the question of the mootness of the review, as related to our holding in 15,765, Dyer versus Securities and Exchange Commission [the instant case], in connection with the hearing of this cause on its merits." Should the court below overrule its prior decision on mootness, it might also consider vacating its judgment in the instant case, and then decide both cases on the merits. The issues in the two cases, as petitioners have represented to the court below, "are virtually the same and, for the most part, have already been briefed in Case No. 15,765."

[4] When petitioners filed their petition for rehearing in the court below on the question of mootness, the Commission filed no statement of its views since Rule 15 (c) of the court's rules provides that no response to such petition "will be allowed unless the court of its own motion, after the filing of the petition, otherwise directs." The court below did not so direct.

CONCLUSION

For these reasons, it is respectfully suggested that disposition of the petition for certiorari be deferred until a decision is rendered in *Dyer* v. *S. E. C.*, No. 15,989, pending in the court below, and in which the identical issue of mootness is raised and is to be briefed and argued by specific order of the Court of Appeals. We shall inform the Court of the disposition below of *Dyer* v. *S. E. C.*, No. 15,989.

Respectfully submitted,

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JUNE 1958.

APPENDIX

1. Pertinent provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a, provide as follows:

Section 12 (e), 15 U. S. C. 791 (e):

> It shall be unlawful for any person to solicit or to permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, power of attorney, consent, or authorization regarding any security of a registered holding company or a subsidiary company thereof in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

Section 24 (a), 15 U. S. C. 79x (a):

> Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such orders in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file

in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. * * *

Section 24 (b), 15 U. S. C. 79x (b):

The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

2. The Commission has promulgated certain Rules under Section 12 (e). Those pertinent are:

[Rule U–61.] The solicitation of any authorization regarding any security of a registered holding company or subsidiary company thereof, except solicitations in connection with any reorganization subject to the approval of the Commission, or in connection with any other transaction which is or will be the subject of any application or declaration filed with the Commission, shall be subject to all rules and regulations now or hereafter adopted pursuant to section 14 (a) of the Securities Exchange Act of 1934 that would be applicable to such solicitation if such security were registered on a national securities exchange: * * *.

[Rule U–62 (a).] *General Provisions.*—No solicitation of any authorization, regarding any security of a registered holding company or a subsidiary company thereof, in connection with any reorganization subject to the approval of the Commission, or in connection with any other transaction which is or will be the subject of an application or declaration filed with the Commission, shall be made except pursuant to a declaration with respect to such solicitation which has become effective in the manner prescribed in paragraph (d) of this rule.

* * * * *

[Rule U–62 (c).] *Contents of declaration.*—Every declaration pursuant to this rule shall, if in connection with any reorganization, be filed on Form U–R–1. Every other declaration subject to this rule may be filed in connection with the application or declaration with respect to the proposed transaction, and shall contain, in addition to the information otherwise specified in such application or declaration, copies of any letters of solicitation proposed to be used, copies of all other documents proposed to be transmitted with such letter of solicitation, and a full statement of the manner in which the solicitation is proposed to be made.

* * * * *

[Rule U–62 (e).] *Order for hearing.*—If the Commission shall issue an order for hearing on a declaration under this rule, such declaration shall become effective only pursuant to the further order of the Commission and subject to such terms and conditions as the Commission may prescribe.

U. S. GOVERNMENT PRINTING OFFICE: 1950